No. 126

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923.

WILLIAM HENRY PACKARD,

Appellant,

vs.

JOAB H. BANTON, as District Attorney of the County of New York, and CHARLES D. NEWTON, Attorney General of the State of New York,

Appellees.

BRIEF IN BEHALF OF APPELLANT.

LOUIS J. VORHAUS,
Attorney for Appellant.

LOUIS J. VORHAUS,
ELIJAH N. ZOLINE,
FREDERICK HEMLEY,
of Counsel.

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SUBJECT INDEX.

ALPHABETICAL TABLE OF CASES.

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BRIEF IN BEHALF OF APPELLANT.

This is an appeal from the decree of the United States District Court for the Southern District of New York, entered on July 17, 1922, denying a preliminary injunction and dismissing the bill for want of equity (Record, 10). The appeal was taken directly to this Court because the constitutionality of an Act of the State of New York is directly involved in this proceeding.

This is a bill in equity to restrain the District Attorney of the County of New York and the Attorney General of the State of New York from

enforcing an Act of the General Assembly of the State of New York, which became a law on April 13, 1922—"An act to amend the Highway Law, in requiring indemnity bonds or insurance policies from owners of motor vehicles transporting passengers for hire in cities of the first class," reading as follows:

> "§ 282-b. INDEMNITY BONDS OR INSURANCE POLICIES IN CITIES OF THE *first* CLASS. Every person, firm, association or corporation engaged in the business of carrying or transporting passengers for hire in any motor vehicle, *except street cars, and motor vehicles operated under a franchise by a corporation subject to the provisions of the public service commission law over, upon or along any public street in a city of the first class* shall deposit and file with the state tax commission for each motor vehicle intended to be so operated, either a personal bond, with at least two sureties approved by the state tax commission, a corporate surety bond or a policy of insurance in a solvent and responsible company authorized to do business in the state, approved by the state tax commission, in the sum of two thousand five hundred dollars, conditioned for the payment of any judgment recovered against such person, firm, association or corporation for death or for injury to persons or property caused in the operation or the defective construction of such motor vehicle. Such bond or policy of insurance shall contain a provision for a continuing liability thereunder notwithstanding any recovery thereon. If at any time, in the judgment of the state tax commission, such bond or policy is not sufficient for any cause, the commission may require the owner of such motor vehicle to replace such bond or policy with another ap-

proved by the commission. Upon the acceptance of a bond or policy, pursuant to this section, the state tax commission shall issue to the owner of such motor vehicle a certificate describing such vehicle and that the owner thereof has filed a bond, or policy, as the case may be, required by this section. Either a personal or corporate surety upon a bond filed pursuant to this section or an insurance company whose policy has been so filed, may file a notice in the office of the state tax commission that upon the expiration of twenty days from such filing such surety will cease to be liable upon such bond, or in the case of such insurance company, that upon the expiration of such time such policy will be canceled. The state tax commission shall thereupon notify the owner of such motor vehicle of the filing of such notice, and unless such owner shall file a new bond or policy of an insurance company, as provided by this section, within such time as shall be specified by the state tax commission, such owner shall cease to operate or cause such motor vehicle to be operated, in such city, and the registration of such motor vehicle shall be automatically revoked. Any person, firm, association or corporation, operating a motor vehicle in a city of the first class, as to which a bond or policy of insurance is required by this section who or which shall operate such vehicle, or cause the same to be operated, while such a bond or policy, approved by the state tax commission as required by this section, is not on file with the tax commission, shall be guilty of a misdemeanor.

§ 2. This act shall take effect July first, nineteen hundred and twenty-two."

The suit is brought by the complainant in behalf of himself and all other persons similarly situated.

The affidavits attached to the complaint show that about 15,000 persons, *i. e.*, owners of taxicabs and taxi drivers, will be affected by the provisions of said Act when it goes in effect.

The bill further alleges in substance that since the passage of said Act the insurance companies doing business in Greater New York have fixed a rate of premium for a continuing bond of $2,500 for each motor vehicle in the sum of $960; that the net income from the operation of a motor vehicle is approximately $35 per week; that as a result of said law the net income of a taxicab man would be reduced approximately to $16.50 per week, and that the practical operation of said law will result in confiscation of the earnings of the complainant for the benefit of the insurance companies.

The bill charges that said Act is unconstitutional and violates the Fourteenth Amendment to the Constitution of the United States forbidding any State to "deny to any person within its jurisdiction the equal protection of the laws," and that it also deprives the complainant and all other persons similarly situated of due process of law guaranteed by said Fourteenth Amendment.

It is charged that the law discriminates against the complainant and all other taxicab owners in the following manner:

> A. That said Act discriminates between common carriers of the same class, *i. e., expressmen* using the streets for the delivery of freight for hire in and about the public streets in cities of the first class in the State of New York, and who, like the complainant, are not subject to the provisions of the Public Service Laws of the State of New York.

B. That it further discriminates between common carriers *by exempting from such statute street cars and motor vehicles operated under a franchise by a corporation subject to the provisions of the Public Service Commission Law.*

C. That is further *discriminates in favor of all owners of motor vehicles* carrying or transporting passengers for hire in all parts of the State of New York *other than in cities of the first class.*

D. That it further *discriminates in favor of taxicabs operated for hire in cities other than of the first class* in the State of New York where this statute by its terms is not operative, and thus not only discriminates between persons engaged in the same vocation, but discriminates against and in favor of injured persons in the different parts of the State.

E. That it discriminates in *favor of owners of private motor cars used for conveyance of passengers but not for hire as well as for conveyance of freight.*

On this bill an order was made requiring the defendants to show cause why the injunction should not be granted. The matter was heard before a statutory Court, consisting of three Judges, organized for the purpose of hearing this application.

On this hearing the Attorney General of the State of New York filed an answer admitting the allegations contained in paragraphs 1, 2, 3 and 6 of the bill, and denying the allegations set forth in paragraph 4. The defendant is without knowledge as

to the facts set forth in paragraph 5 of the bill of complaint (Record, 7).

The defendant, District Attorney of the State of New York, filed a motion to dismiss the bill (Record, 9).

At this hearing the following affidavits were submitted and read before the Court:

THE AFFIDAVIT OF THE PLAINTIFF

(Record, 12 *et seq.*).

That he is the owner of four taxicabs and has been operating taxicabs for upwards of six months in the City of New York; that from his personal experience affiant knows that the average net income of a taxicab driver in the City of New York is not in excess of $35 per week, and in many instances it is considerably less than $35 net per week; that all the insurance companies doing business in the City of New York have fixed $960 per year as the premium for a $2500 bond as required by the law recently enacted and which law becomes operative on the 1st day of July next. This premium is at the rate of approximately $18.50 per week; that with a net income not in excess of $35 per week, and with an obligation to pay approximately $18.50 per week for the insurance, the net amount in the hands of the taxicab driver would not be in excess of $16.50 per week; that most taxicab owners do not own their cars outright, but purchase their cars subject to a chattel mortgage requiring the payment of a certain amount per month. In most instances the amount paid on account of the chattel mortgage is $100 per month, plus interest. It is therefore evident that the taxi-

cab driver will not have sufficient money out of his income from his occupation with which to pay the mortgage nor will any money be left from which he and his family may live. A vast majority of the taxicab drivers are married men and have families to support and the additional burden required by the payment of the premium will make it impossible for the taxicab driver to continue in his present calling; that it is to be borne in mind that the rate that the taxicab driver may charge is fixed by law and at the present time the various taxicab drivers do not charge the full rate allowed by law, for the reason that the public would not patronize the taxicabs if the full rate were charged, so that there is no possibility of securing an additional income by charging a greater rate.

A tabulation from the records furnished by the Medical Department of the City of New York was made showing the number of deaths attributable to accidents in the years 1918 and 1919 in the City of New York. Annexed hereto and made a part hereof is a copy of such tabulation; that the total number of deaths attributable to automobile accidents in the City of New York for the year 1918 was 652; of this number 14 are attributable to accidents in which taxicabs figure and 467 are attributable to automobiles other than taxicabs, including private cars, and 171 are attributable to auto trucks, and for the year 1919 the total number of deaths in the City of New York attributable to automobile accidents is 702, and of this number 23 are attributable to accidents in which taxicabs figure and 424 are attributable to automobiles other than taxicabs, including private cars, and 255 to commercial autos.

THE AFFIDAVIT OF PATRICK J. DEVINE

(Record, 14-15).

That he has been and is the owner and driver of a taxicab for about eleven years past, and for the last two years his net income has not exceeded $30 per week, and frequently was considerably less. In order to make this amount it was necessary for him to work on the average of twelve to fourteen hours a day; that there are upwards of 15,000 taxicab owners in the same position that he is in in the City of New York. Most of them are married men and have families dependent upon them; that he made inquiries from the insurance companies in the City of New York and knows that the premium that they are asking for the bond in accordance with the law recently enacted is $960 per year, which is approximately $18.50 per week. It will not be possible for him or others similarly situated to pay a premium of that kind from the income that he and others have been deriving from the operation of taxicabs and there will be no alternative but to give up that calling. That he made inquiries amongst his friends in the hope of being able to get a private bond, as permitted by the statute, and finds that it will be impossible for him to get any individuals who are either willing or able to go on any private bond, such as is demanded by the statute, and he also knows from conversations with other taxicab owners that they also will find it impossible to get private bondsmen. It is a matter of common knowledge that there are thousands of automobile trucks doing a private trucking business in the City of New York, being common carriers from one point to another in the City of New York and from the City of New York to other points, and these individuals will not be com-

pelled to give any bond in accordance with the requirements of the statute. It is a matter of common knowledge that these private common carriers have in the past had a great many more accidents than taxicab drivers have had.

THE AFFIDAVITS OF GENNARO PUCILLA, MORRIS POLLOCK AND LOUIS WARSHAW are substantially the same as that of Mr. Devine above recited.

Attached to the affidavit of CHARLES C. SCHWARTZ is a tabulation of the Medical Department of the City of New York showing the number of deaths attributable to accidents upon the streets and highways of the City of New York during the years 1920 and 1921 (Record, 19), showing the percentage of accidental deaths caused by taxicabs to be very small as compared with privately owned cars or other transportation vehicles.

Affidavits in opposition were submitted by the defendants, viz.:

THE AFFIDAVIT OF HARVEY J. DRAKE

(Record, 22-23).

The affiant is counsel for the Insurance Department; that the Act was passed in pursuance to public agitation because those engaged in the taxicab business were financially irresponsible; that during the year 1921 sixty persons were killed by taxicabs; on hearsay, affiant states that the number of unpaid judgments for deaths caused by accidents due to the negligence of taxicab drivers was 12,000. From the information received by affiant, he is of the opinion that the rate of pre-

mium for writing the bond in question would be about $45 per month.

THE AFFIDAVIT OF JACOB KENDRICK UPTON is to the effect that of the taxicabs operating in New York not more than 5 per cent. carry any liability insurance; that there are operating in New York City about 325,000 automobiles other than taxicabs and about 13,000 taxicabs; that there were injured by automobiles other than taxicabs in the City of New York, 15,564 persons, being a ratio of one to twenty-two; that according to the same figures, there were killed and injured by taxicabs within the City of New York in the year 1921, 2,056, being a ratio of one to six; that the rate for premium for a taxicab bond to be charged by all mutual automobile insurance companies is $540 per year; that the average wage earned by a taxicab driver is between $40 and $50 per week (Record, 26-27).

THE AFFIDAVIT OF WILLIAM COOPER is to the effect that he drives his own taxicab and operates it throughout the City of New York and has done so for the past five years. His average earnings for the past three months have been $100 per week, including tips. It costs him $35 per week to operate and maintain his taxicab, including depreciation. Of the $35 of expense per week, $10 is depreciation on a new Dodge bought last March. The greater number of taxicab operators use second-hand cars on which the depreciation has been absorbed; that the ordinances of the City of New York permit a charge of 30 cents for the first half mile or any fraction thereof for not more than two persons, and 40 cents for three or more passengers; 10 cents is allowed for each succeeding quarter of

a mile or fraction thereof for two passengers, and 10 cents for every succeeding sixth of a mile for three persons. For each piece of luggage carried outside, excepting handbags and suitcases, 20 cents is charged. The waiting time allowed under the ordinance is $1.50 per hour. However, three-quarters of the taxicab drivers do not charge the maximum amount permitted by the city ordinances, but charge only 40 cents for the first whole mile and 30 cents for each additional mile. In the taxicab business the average charge for a ride is between 60 and 70 cents (Record, 28).

THE AFFIDAVIT OF WILLIAM E. MCGUIRK is to the effect that he is treasurer and general manager of the American Yellow Taxi Operators, Inc., owning and operating 303 taxicabs made by the same manufacturer as those operated by the plaintiff and costing within $150 of the same as his; that he has been engaged in the manufacture and sale of taximeters, the sale of taxicabs and their operation over fifteen years in the City of New York; that he read the bill of complaint and the supporting affidavits of the plaintiff. Plaintiff operates what is known as "Green Flag Taxis" and does not charge the maximum rate permitted by ordinance. Affiant is of the opinion, from his general knowledge of the operations of taxicabs in the City of New York, that the average gross earnings upon a taxicab well managed in the City of New York over a period of twelve months is not less than $210 per week, operated twenty hours per day by two drivers. It is the general custom to double shift the cabs. The average net profit over the same period from each cab is not less than $60 per week (Record, 29).

An additional affidavit was submitted on behalf of the plaintiff, William Henry Packard, in which he states that the four cars referred to in the bill of complaint, owned by him, cost him $11,200, and are worth that sum to him providing he can continue in the business of operating taxicabs, but if for any reason he shall be unable to continue in the business of operating taxicabs, he would not be in a position to realize more than 50 per cent. of the cost thereof to him. Affiant inquired amongst his relatives and friends for the purpose of ascertaining whether it would be possible for him to get individuals to go on private bonds for him, so as to avoid the necessity of having any insurance company bonds, but he has neither friends nor relatives who would be able and willing to qualify as individual bondsmen. Therefore, if the law is upheld affiant will be compelled to secure insurance company bonds, or else go out of business. It would cost $960 per year per car, which means an expense of $3,840 per year to him. In other words, affiant is faced with this situation, that either he must pay $3,840 per year for insurance or else he must sacrifice his business and the good-will thereof—which good-will he values in excess of $5,000—and at the same time he would be compelled to sacrifice the four cars at a loss to him in excess of $5,000 on the cars, making a loss to him in toto in excess of $10,000. On the other hand, if he were to operate his taxicabs without securing bonds, and if the law were held to be constitutional, he would be liable as a misdemeanant, and he is informed that the maximum penalty for a misdemeanor is imprisonment for one year or a fine of $500, or both, so that if he were to operate his four cars, he would be

liable for each operation in sums aggregating $2,000 (Record, 21).

On hearing, the Court denied the motion for preliminary injunction and dismissed the bill (Rec., p. 10). Hence the appeal to this Court.

Errors Relied Upon.

1. The Court erred in denying the motion of the complainant for a preliminary injunction and in not holding that the act of the General Assembly of the State of New York, entitled "An Act to amend the highway law, in requiring indemnity bonds or insurance policies from owners of motor vehicles transporting passengers for hire in cities of the first class," is unconstitutional and violates the Fourteenth Amendment to the Constitution of the United States, providing that no State should deny to any person within its jurisdiction the equal protection of the laws nor deprive a person of his life, liberty and property without due process of law (Assignment of Errors No. 1, Record, 31).

2. The Court erred in holding that the bill of complaint does not state facts sufficient to constitute a cause of action and in dismissing the bill without prejudice (Assignment of Errors No. 2, Record, 31).

I.

Preliminary Questions Relating to the Jurisdiction of the Court Below.

In his answer, the Attorney General admits paragraph 3 of the bill, which alleges that the amount in dispute exceeds the sum of $3,000, exclusive of interest and costs, but the defendant, Joab H. Banton, District Attorney, filed a motion to dismiss the bill, in which it is, among other things, stated:

(a) That no sufficient facts are averred in the bill of complaint to show that the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.

(b) That it appears upon the face of the bill that the court of equity has no jurisdiction.

(c) That the District Attorney may not be enjoined to enforce a criminal statute.

As to the Jurisdictional Amount.

The bill affirmatively alleges that the amount in controversy exceeds, exclusive of interest and costs, the sum of $3,000 (see par. I of the Bill of Complaint). This is admitted by the motion to dismiss. Moreover, the statute in question which is fully set up in paragraph III of the bill shows that a violation of same constitutes a misdemeanor. A misdemeanor under the laws of New York is punishable by one year imprisonment or a fine of $500. For the operation of four cars without complying with

the statute the penalty for each offense would be $2,000.

The amount of the penalty is a proper subject of computation for jurisdictional purposes.

> *American Fertilizing Co.* v. *Board of Agriculture,* 43 Fed., 609.

The bill further shows that the premium for each bond for the operation of each car would amount to $960 and that the premiums to be paid for the insurance for the four cars will amount to $3,840.

In addition to that, the plaintiff's good will, which he values at $5,000, would be lost to him (see additional affidavit of the plaintiff, Record, 21).

The value of the matter in dispute may for the purpose of jurisdiction be shown by affidavits.

> *Carr* v. *Fife,* 156 U. S., 494.
> *Gage* v. *Pumpelly,* 108 U. S., 164.

Aside from the plaintiff's affidavit, the allegations of the bill, standing by themselves, are amply sufficient.

> *City of Hutchinson* v. *Beckham,* 118 Fed., 399 (syllabus 2) (C. C. A.).
> *Butchers & Drovers Stockyards Co.* v. *Louisville & Nashville R. R. Co.,* 67 Fed., 35 (C. C. A.).
> *Rocky Mt. Bell Tel. Co.* v. *Montana Federation of Labor,* 156 Fed., 809.

It is well settled that in a suit to enjoin for threatened or continued commission of certain acts, the amount in dispute, for jurisdictional purposes, is not determined by the amount which the complainant might recover from defendant in an

action at law for the acts complained of, *but by the value of the right to be protected, or the extent of the injury to be prevented by the injunction.*

Scott v. *Donald,* 165 U. S., 107.
Nashville, C. N. St. L. Ry. Co. v. *M'Connell,* 82 Fed., 65.
Butchers & Drovers Stockyards Co. v. *Louisville & Nashville R. R. Co.,* 67 Fed., 35 (C. C. A., 290).
City of Hutchinson v. *Beckham,* 118 Fed., 399.

This is particularly true in cases involving the conduct of business which is unconstitutionally restrained.

See authorities, *supra.*

An Injunction is the Proper Remedy.

It is no longer open to question that the court of equity may restrain the enforcement of unconstitutional criminal statutes or ordinances.

Ex parte Young, 209 U. S., 123.
Western Union v. *Andrews,* 216 U. S., 165.
Hammer v. *Dagenhart,* 247 U. S., 251.
Rast v. *Van Deeman,* 240 U. S., 342.
Philadelphia Co. v. *Stimson,* 223 U. S., 605.
Dobbins v. *Los Angeles,* 195 U. S., 233, and cases there cited.
Weed v. *Lockwood,* 266 Fed., 785 (C. C. A., 2nd Circuit, opinion per Manton, *J.*), holding that District Attorney may be enjoined.

Lusk v. *Town of Dora,* 224 Fed., 650.
Cramp & Sons v. *International Turbine Co.,* 246 U. S., 28.

The District Attorney and the Attorney General Are Proper Parties.

It is well settled that the prosecuting officers of a State are proper parties and may be enjoined to enforce an unconstitutional statute.

Truax v. *Raich,* 239 U. S., 33.
Little v. *Tanner,* 208 Fed., 605.
Ex parte Young, 209 U. S., 123.

It is well settled that where property rights will be destroyed, unlawful interference by criminal proceedings under a void law or ordinance may be reached and controlled by a decree of a court of equity.

Hammer v. *Dagenhart,* 247 U. S., 251.
Dobbins v. *Los Angeles,* 195 U. S., 223.
Ex parte Young, 209 U. S., 123.
Davis v. *Berry,* 216 Fed., 413.
Kinnane v. *Detroit Creamery Co.,* 255 U. S., 102.

ARGUMENT ON THE MERITS.

POINT I.

The Act in question contravenes the Fourteenth Amendment to the Constitution of the United States.

The Fourteenth Amendment to the Constitution of the United States forbids any State to deny "to any person within its jurisdiction the equal protection of the laws."

While it is no longer open to question that a State may classify the subjects of its laws and make provisions applicable to one class of subjects that have no application to another class, yet it is equally well established that the members of these classes may not be selected arbitrarily without just or sound reason, inherent in their respective situations and circumstances relative to the subject-matter of the legislation for the difference in the burdens imposed and the privileges conferred upon them by such a discriminatory law.

The Object of the Statute—The Discriminative Features.

The only hypothesis upon which the statute in question could be sustained is that it was passed under the police power of the State for the purpose of protecting the public against the negligent operation of a motor vehicle by a common carrier for hire by insuring it in a measure—a recovery of damages in the event a judgment should be en-

tered against such common carrier. But, if this be the object of the legislation, it falls short of attainment by reason of the many exemptions provided by it or because of the limited class to which it by express terms is made applicable.

(a) The Act in question here exempts:

Expressmen transporting in large automobile trucks all kinds of freight upon and along the crowded public streets of Greater New York, and who, like the taxicabs, are not within the jurisdiction of the Public Service Commission. No reason is perceived why a burden, such as is imposed upon owners of taxicabs, should not be imposed upon the owners and operators of express automobiles—*both being common carriers.* The Court will take judicial notice that the operation of large trucks and vans upon the public streets is by far more dangerous to pedestrians and those driving along such streets than the operation of a small taxicab. We, therefore, respectfully contend that the statute in question here is discriminatory and class legislation and violates the spirit of the Fourteenth Amendment of the Constitution of the United States and is contrary to the principles of civil liberty and natural justice. It gives to a part of a class of citizens privileges and advantages which are denied to all others in the State under like circumstances, and subjects one branch of the same class to burdens from which all others, under like circumstances, are exempted.

Holden v. *James,* 11 Mass., 396.
Lippman v. *People,* 175 Ill., 101.

That expressmen and taxicab men are both common carriers is well settled. All who pursue the business of carrying passengers or goods or information for hire for the public generally, railroad companies, express companies, telegraph companies, telephone companies, street car companies, owners and operators of omnibuses, cabs, carriages, carts, drays, trucks, sleds, boats, and many other vehicles are common carriers.

Hutchinson, Carriers, 2d ed., §§ 58-69.

(b) *Street cars and motor buses.*

There seems to be no good reason for exempting from the operation of the statutes street cars and motor vehicles operated under a franchise by a corporation subject to the provision of the Public Service Law. If, as already stated, the object of this legislation was to insure the public to recover damages by reason of the careless operation by common carriers of a car self-propelled, then no valid ground exists for exempting street railways and owners of buses from the operation of the statute. Experience has shown, and the record sustains our contention, that the fact that a common carrier happens to be a street railway is no guarantee that a judgment for personal injuries or injuries to property recovered against it would be collected. On the contrary, the bill of complaint in the instant case (Rec., p. 4) shows that many street railways have gone into receivership, and that for many years last past they were unable to pay claims for personal injuries. This is admitted by the motion to dismiss filed by the District Attorney of New York County. Why, then, should a street railway be exempt from furnishing

a bond to protect the public from the negligent operation of a street car? In the cases where a classification for street railways was sustained it was assumed, without evidence, that street railways are more solvent than the owners of jitneys; but, in the instant case, there is no room for indulging in presumptions because the facts as they actually exist are brought before the Court, thus demonstrating that there is in fact no real basis for the classification made by the Legislature.

Test of Constitutionality Under the Fourteenth Amendment.

In order to justify a discrimination in face of the constitutional provision against unequal laws, there are three indispensable conditions to a constitutional imposition of liabilities or burdens upon or a constitutional grant of rights or privileges to the members of one class which the other members of the State do not bear or enjoy. There must be

First: A difference between the situation and circumstances of all the members of the class and the situation and circumstances of other members of the State in relation to the subjects of the discriminatory legislation as presents a just and natural reason of necessity or propriety for the difference made by the law in their liabilities and rights. While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classi-

fication cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification.

Gulf, C. & S. F. R. Co. v. *Ellis,* 165 U. S., 150, 155, 165.

Cotting v. *Kansas City Stock Yards Co.* (*Cotting* v. *Godard*), 183 U. S., 79, 107-112.

Connolly v. *Union Sewer Pipe Co.,* 184 U. S., 540, 559.

Atchinson, Santa Fe Ry. Co. v. *Vosburg,* 238 U. S., 56.

Southern R. Co. v. *Greene,* 216 U. S., 400, 536.

Nichols v. *Walter,* 37 Minn., 264; 33 N. W., 800.

Lavallee v. *St. Paul, M. & M. R. Co.,* 40 Minn., 249.

State v. *Loomis,* 115 Mo., 307, 314.

Ballard v. *Mississippi Cotton Oil Co.,* 81 Miss., 507.

SECOND: No person who does not belong to the class may be included therein, and all persons within the influence of the legislation relative to the class must be treated alike thereby.

See authorities, *supra.*

THIRD: All who are in situations and circumstances relative to the subject of the discriminatory legislation indistinguishable from the situations and circumstances of the members of the class must be brought under the influence of the legislation and treated by it in the same way as are the members of the class.

An act of class legislation, to stand in the face of the Constitution, must include all who belong to the class; not all who bear similarity in some characteristic to those included, but all who cannot be distinguished from them in that particular characteristic which justified the act. And it must include none who do not belong to the class.

> *Bassette* v. *People,* 193 Ill., 334, and cases cited.
> *Lippman* v. *People,* 175 Ill., 101.

The rule announced by the Supreme Court of Illinois is likewise the rule in the United States Court in its application to the Fourteenth Amendment.

Thus, in *Connolly* v. *Union Sewer Pipe Co., supra* (184 U. S., 540), a statute of Illinois directed against trusts and combinations, was held to contravene the Federal Constitution because it arbitrarily excepted from its scope and operation combinations in agricultural products and live stock. It was there said:

> "Arbitrary selection can never be justified by calling it classification. The equal protection commanded by the 14th Amendment forbids this."

In *Gulf, C. & S. F. R. Co.* v. *Ellis* (165 U. S., 150) a statute which authorized the award of judgment in actions against railway companies of costs not given in suits against other defendants, was held void as violating the equal protection of the law guaranteed by the Federal Constitution in that it singled them out from all citizens and corporations. It was there said:

> "Classification for legislative purposes must have some reasonable basis upon which to stand. But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this."

In *Cotting* v. *Kansas City Stock Yards Co., supra* (183 U. S., 79), the act attacked, in terms applied only to certain stock yards in the State of Kansas, which for the preceding twelve months had an average daily receipt of not less than 100 head of cattle or 300 head of hogs or 300 head of sheep. For this reason the Supreme Court held it on a review of cases to be unconstitutional.

In deciding the case, the U. S. Supreme Court, among other cases, quoted from the case of *Vanzant* v. *Waddel,* 2 Yerger, 262, 270, reading as follows:

> "Every partial or private law, which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of the community, who made the law, by another."

And in the course of the opinion the U. S. Supreme Court said:

> "The Fourteenth Amendment forbids any State to 'deny to any person within its jurisdiction the equal protection of the laws.' The scope of this prohibition has been frequently considered by this court.
>
> "In Barbier v. Connolly, 113 U. S., 27, 31, it was said:

'The Fourteenth Amendment, in declaring that no State "shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their person and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses.'

"And in Bell's Gap Railroad v. Pennsylvania, 134 U. S., 232, 237:

'The provision in the Fourteenth Amendment that no State shall deny to any person within its jurisdiction the equal protection of the laws was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any

taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the State in framing their constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our government, might be obnoxious to the constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject that would include all cases.'

"In Gulf, Colorado and Santa Fe R. R. Co. v. Ellis, 165 U. S., 150, 159, which presented solely the question of classification, we said, referring to many cases, both State and national:

'But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice Matthews, speaking for this court, in Yick Wo v. Hopkins, 118 U. S., 356, 369: "When we consider the nature

and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power." The first official action of this nation declared the foundation of government in these words: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness." While such declaration of principles may not have the force of organic law, or be made the basis of judicial decision as to the limits of right and duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government.'"

(c) *Owners of pleasure vehicles and trucks.*

Tested by these rules as laid down by the courts, the act is further unconstitutional by reason of the discriminating aforesaid, and, it is submitted, that it is difficult to perceive why owners of pleasure vehicles and auto trucks using the streets indiscriminately, and who by training and experi-

ence are less competent to operate a motor vehicle than a taxicab driver, should be exempt from the operation of a law, and why such onerous burdens should be imposed upon owners of taxicabs. Experience has shown, and the affidavits in the instant case show, that the greater part of the accidents in and upon the streets of Greater New York are the result of negligent driving done by owners of pleasure vehicles rather than those of taxicab drivers—the statistical figures being as follows:

The total number of deaths attributable to automobile accidents in the City of New York for the year 1918 was 652; of this number 14 are attributable to accidents in which taxicabs figure and 467 are attributable to automobiles other than taxicabs, including private cars, and 171 are attributable to auto trucks; for the year 1919 the total number of deaths attributable to automobile accidents is 702, and of this number 23 are attributable to accidents in which taxicabs figure and 424 are attributable to automobiles other than taxicabs, including private cars, and 255 to commercial autos.

(See Affidavit of William H. Packard, Record, 13).

The total number of deaths attributable to automobile accidents in the City of New York for the year 1920 was 690; of this number 26 are attributable to accidents in which taxicabs figure and 403 are attributable to automobiles other than taxicabs, including private cars, and 261 are attributable to auto trucks; for the year 1921 the total number of deaths in the City of New York attributable to automobile accidents is 786, and of this number 53 are attributable to accidents in which taxicabs figure and 478 are attributable to automobiles other

than taxicabs, including private cars, and 255 are attributable to commercial autos.

(See Affidavit of Charles C. Schwartz, Record, 19).

POINT II.

The classification provided for by the Act, by applying the operation of it only to cities of the first class, is unreasonable and discriminates between members of the same class of common carriers plying their vocations in different parts of the State—the statute therefore contravenes the Fourteenth Amendment to the Constitution of the United States.

The Act discriminates between the owners of motor vehicles carrying passengers *for hire* upon the streets of cities of the first class and other taxicab owners engaged in the same business in other parts of the State. Under this Act owners and operators of taxicabs upon the streets of any city or village other than a first class city need not furnish the security provided for in the Act. The statute thus places onerous burdens upon members of the same class in the same State not common to all other citizens of the State similarly situated. . .

We respectfully refer to the authorities cited in Point I of this brief as fully applicable to the point now under discussion. In addition thereto we respectfully submit that classification by population will not stand unless there is a good reason for such classification.

Bassette v. *People*, 193 Ill., 334.
1 *Dill Mun. Corp.*, 5th ed., § 151.
Cooley Const. Lim., 7th ed., 558-559.
Fleming v. *City of Memphis*, 148 S. W. (Tenn.), 1057.
Sutton v. *State*, 96 Tenn., 696; 33 L. R. A., 589; 36 S. W., 697.
City of Janesville v. *Carpenter*, 8 L. R. A., 808 (Wis.).
1 *Elliott, Roads & Streets*, § 521.

In *Bassette* v. *People*, 193 Ill., 334, the Supreme Court of Illinois passed upon the validity of a statute providing for the licensing of horseshoers. That statute classified the municipalities into those of 50,000 or more inhabitants where the act shall be operative, those between 10,000 and 50,000 where it may be operative at the option of the municipalities, and those below 10,000 where it shall not be operative. In holding the statute unconstitutional, the Supreme Court, per Magruder, *J.*, said:

> "Cooley, Const. Lim., 6th ed., pp. 481, 483, says: 'A statute would not be constitutional which should select particular individuals from a class or locality, and subject them to peculiar rules, or impose upon them special obligations or burdens from which others in the same locality or class are exempt. Everyone has a right to demand that he be governed by general rules, and a special statute, which without his consent singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments.' In the case at bar, the act deals with one class of workmen, to wit,

horseshoers. It grants to horseshoers living in cities and towns containing a population less than 10,000, and in those containing a population between 10,000 and 50,000 a special privilege, to wit, the privilege of being exempt, either entirely or conditionally, from the obligation to take out licenses to pursue their business, *while it requires horseshoers living in cities and towns containing a population of 50,000 or over to obtain such license. The manner in which the act discriminates in favor of particular persons of one class pursuing one occupation, and against all others of the same class, places it in opposition to the constitutional guaranties hereinbefore referred to.* * * *

"The observations thus made render it unnecessary for us to consider the question whether the court below did or did not err in admitting in evidence the ordinance set forth in the statement of facts preceding this opinion. In view of what has been said, it is immaterial whether the act in question, if applicable to towns and cities, could have been adopted by a town or city by ordinance, or whether it was necessary to secure its adoption by submitting it to a vote of the people living in such town or city.

"For the reasons herein stated, we are of the opinion that the act in question is unconstitutional. This being so, the court below erred in refusing to hold as law the propositions submitted by the plaintiff in error which declared it to be unconstitutional."

In *Fleming* v. *City of Memphis,* 148 S. W., 1057 (Tenn.), the question presented for determination was the validity of Acts of Tennessee, which read as follows:

"That the counties in which the taxing districts are situated, and the taxing dis-

> tricts themselves, shall not be liable for damages or injuries to persons or property by reason of defects in the streets or alleys or other property under the control and within said taxing districts, or for the conduct of those managing the affairs of such districts."

In holding the Act unconstitutional, the Court said:

> "We think it too clear for argument at this late day that the exemption, or 'special dispensation,' as counsel denominate it, in favor of the city of Memphis in the foregoing provision of its charter, is violative of the section of the Constitution just quoted.
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> * * *
>
> "It is true that laws public in their character, and otherwise unobjectionable, may extend to all citizens, or be confined to particular classes. With respect to the provision of the Constitution under consideration, citizens or municipalities may be classified when the object of the legislature is to confer upon them certain rights, privileges, immunities, or exemptions not enjoyed by the community at large. But this classification must not be mere arbitrary selection. It must have some basis which bears a natural and reasonable relation to the objects sought by the legislation, and there must be some good and valid reason why the particular municipality upon whom the benefit is conferred should be preferred."

In *State* v. *Whitcom,* 122 Wis., 110; 99 N. W., 468, a statute which exempted, among others, dealers in agricultural implements maintaining permanent places of business, keepers of retail meat markets, fish dealers, and sellers of fruit or vegetables *in cities of certain classes,* was held to

deny a peddler of teas and coffees the equal protection to which the Federal and State Constitutions entitled him, whether the purpose of such act was taxation or a regulation of conduct. The Court said:

> "Other glaring false classification is presented by the exemption of dealers in agricultural implements maintaining permanent places of business, or keepers of retail meat markets, or fish dealers, and sellers of fruits or vegetables in cities of the first class, selling their respective wares. What consideration of public welfare could exclude a retail grocer from peddling his wares, while permitting the keeper of an adjoining meat market to peddle perhaps the same articles, or exempt the dealer in plows from the restriction placed on the dealer in paints, fence wire, or any other merchandise, we confess our inability to discover. Under this act, the agent of this appellant's employer and an agent of the keeper of a nearby meat market may start together on the same vehicle, each with his samples—tea, coffee, sugar in one satchel, ham, bacon, cured meats, and lard in the other; may visit the same farmer, in the same vehicle, one take an order for coffee and sugar, the other for lard and bacon. The first is a criminal, the other not. The illustration leaves nothing to be said. It is discrimination between individuals of the same class, not between legitimate classes."

In *City of Janesville* v. *Carpenter, supra* (8 L. R. A., 808), the Court said:

> "Its operation is restricted and partial to that part of Rock River within the County of Rock, while said river elsewhere and all other rivers are excluded. It gives the right

of action to the resident taxpayers of said county while all others are excluded from the exercise of such right, whatever interest they may have in the subject matter of the action. It gives the right of action to the owners or lessees of the right to use the water of said river to operate any mill or factory within said county, and excludes all other owners or lessees of such water powers, by means of said river, elsewhere. It gives to such favored classes the stupendous advantage and exceptional privilege of maintaining such actions without proof that any injury or danger has been or will be caused by reason of such act. It would be difficult, if not impossible, to crowd into so short a statute any more or greater violations of that principle, so essential to a free government, of 'equal, general and standing laws.' For these reasons this Statute is unconstitutional and void. It is not, perhaps, a violation of any special clause of the Constitution in these respects, but it is a violation of its essential spirit, purpose and intent, and contrary to public justice.

Bull v. *Conroe*, 13 Wis. 234;
Durkee v. *Janesville*, 28 Wis. 464;

and cases cited in the opinion."

POINT III.

The practical effect of the Act is to deprive the complainant-appellant and all other persons similarly situated of his and their property and of due process of law in violation of the Fourteenth Amendment.

The record in this case shows that the net result of this legislation is to benefit the large owners of

taxicab companies operating many cars and insurance companies to the detriment of the complainant and all other persons similarly situated. The premium demanded of the taxicab men is $960 per year. His earnings are about $1,820 per year. In this manner he is deprived of his earnings to the extent of $960 per year, which is a virtual confiscation of his earnings.

The right to labor or earn one's livelihood in any legitimate field of industry or business is a right of property, and any unlawful or unreasonable interference with or abridgment of such right is an invasion thereof, and a restriction of the liberty of the citizen as guaranteed by the Constitution.

Lochner v. *New York*, 198 U. S., 45.
Yick Wo v. *Hopkins*, 118 U. S., 356.

No reason is perceived why such onerous burdens should be laid upon the complainant and all others of his class, and why he should be deprived of the means of his livelihood. In view of the discriminatory features of the Act, it is respectfully submitted that the Act is not only unconstitutional by reason of its unequal operation, but because it takes from the complainant his earnings without due process of law, and without good reason therefor.

It is true that the Act also provides for private sureties, but the average taxicab driver, including the complainant, is not so fortunate as to have among the immediate members of his family or among his friends persons who could qualify on such a bond, or who would be willing to risk all they had for the benefit of their relative or friend,

so that in the last analysis they must resort to an insurance policy, and in so doing they must necessarily strip themselves of their means to a livelihood.

When, in addition to that, the discriminatory features of the Act are considered, the Court should have no hesitancy in considering its practical result, and should not hesitate in declaring the law unconstitutional.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the decree of the Court below is erroneous and should be reversed; that the Act in question be held unconstitutional, and that the injunction as prayed for in the bill of complaint should be granted.

Respectfully submitted,

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